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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 687 - 688

METROPOLITAN TRUST CO., AS CONSERVATOR FOR STANLEY O. LAWRENCE, an incompetent person,
Petitioner,

vs.

THE MUTER COMPANY AND LESLIE F. MUTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THOMAS D. NASH
DANIEL J. LAMONT
JOHN J. KENNELLY,
111 W. Washington Street,
Chicago, Illinois.

Attorneys for Petitioner, Metropolitan Trust Company, as Conservator for Stanley O. Lawrence, an Incompetent Person.

Of Counsel:
DANIEL J. LAMONT,
JOHN J. KENNELLY,

BLAKELY PRINTING COMPANY, CHICAGO

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I. The judgment of the Court of Appeals is more than a flagrant violation of Rule 52(a); it denies plaintiff due process of law.

(a) The Court of Appeals, by a divided court, reversed the judgment for the plaintiff solely on the basis that a release signed by plaintiff was supported by consideration, consisting of a salary increase given plaintiff by defendants, although the plaintiff testified and the defendants conceded in their sworn answer and testimony that the salary increase was not consideration for the release, and the trial court upon such *uncontradicted* testimony and pleadings found that there was no consideration for the release.

(b) The action of the Court of Appeals was a mere arbitrary and capricious exercise of power and was in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights, apart from Rule 52 (a). Their action was not merely procedurally erroneous; their action substantively deprived plaintiff of his property without due process of law.

(c) The federal judiciary is no less limited by the due process clause of the Fifth Amendment than the federal legislature.

Authorities Cited.

Cases.

Amer. Ry. Express v. Kentucky, 273 U. S. 269, 273, 71 L. Ed. 639, 47 S. Ct. 353 6
Andrew Jergens Co. v. Conner, 125 Fed. (2nd) 686 20
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Katz Underwear Co. v. U. S., 127 Fed. (2nd) 965 20
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Mosby v. Chapin, 217 Ill. A. 442 17
Occidental Life Insurance Co. v. Thomas, 107 Fed. (2nd) 876 20
Sundt v. Turman Oil Co., 107 Fed. (2nd) 762 20
Toffenetti v. Mellor, 323 Ill. 143, 153 N. E. 825 17
United States v. U. S. Gypsum Co., 68 S. Ct. 525, 92 L. Ed. 552, 333 U. S. 364, 395 21
Virginia R. Co. v. U. S., 272 U. S. 658, 675, 71 L. Ed. 463, 47 S. Ct. 222 6

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Textbooks.

Williston, Treatise on Law of Contracts, Sec. 1820.... 17
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Metropolitan Trust Company of Chicago, as Conservator for Stanley O. Lawrence, an incompetent person, the plaintiff-appellee and cross-appellant below, respectfully prays that a writ of certiorari be issued out of this Honorable Court to review the judgment (R. 743, 744) of the Court of Appeals for the Seventh Circuit, entered November 12, 1948, reversing the judgment of the United States District Court for the Northern District of

Illinois, Eastern Division, which was rendered in favor of the plaintiff, Stanley O. Lawrence, against the defendants, The Muter Company, a corporation, and Leslie F. Muter, for $128,438.33.

OPINIONS BELOW.

The findings of fact and conclusions of law of the district court are not reported. They appear at pages 670-678 of the record. The opinion of the Court of Appeals (R. 731-742) is reported in 171 F. (2d) 380.

JURISDICTION.

The judgment of the United States Court of Appeals was entered November 12, 1948. Petition for rehearing was timely filed on November 26, 1948. It was denied on January 4, 1949. The jurisdiction of the court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 26 Stat. 828, Ch. 517, Sec. 6, as amended, 36 Stat. 1157, Ch. 231, Sec. 240, 43 Stat. 938, Ch. 229, Sec. 1, Title 28 U. S. C. A. Sec. 347. This petition is timely filed in accordance with 26 Stat. 828, as amended, Title 28 U. S. C. A. Sec. 350.

QUESTIONS PRESENTED.

(1) Whether this Court will exercise its power of supervision over a Court of Appeals where such Court reverses a judgment for a plaintiff, by arbitrarily and capriciously refusing to follow fact findings of the District Court, which were supported clearly and unequivocally by the *undisputed* evidence on *both sides*, because, in reality, the judgment of the Court of Appeals denied the plaintiff that due process of law, which is guaranteed to him by the fifth amendment to the Constitution of the United States.

SPECIFICATIONS OF ERROR.

We respectfully submit that the court below erred:

1. In failing to affirm the judgment of the trial court.

2. In so arbitrarily and capriciously disregarding or overruling findings of fact of the trial court, which were supported clearly and unequivocally by the undisputed evidence on *both sides*, that the Court of Appeals not only flagrantly violated Rule 52(a), but in reality denied the plaintiff due process of law.

STATEMENT.

Plaintiff filed an action in equity against the defendants for breach of fiduciary relationship and fraud, arising by reason of the wrongful appropriation of plaintiff's stock interest in General Manufacturing Company, a corporation, which defendants consolidated with defendant Muter Company.

The trial court found that defendants should have issued plaintiff 14,654 shares of Muter Company stock for his stock in General Manufacturing Company, but that defendants issued plaintiff only 2,000 shares of Muter Company stock; that defendants defrauded plaintiff out of 12,654 shares of Muter Company stock, and gave plaintiff judgment against both defendants for $128,438.33, representing the market value of the stock and accrued dividends thereon (R. 677-679).

About one year after the trial, the plaintiff, Stanley O. Lawrence, was adjudicated an incompetent. Metropolitan Trust Company, his Conservator, was substituted for him in the Court of Appeals.

The judgment was reversed by the Court of Appeals for the Seventh Circuit by a divided court. Judge Minton

wrote the majority opinion (R. 731-740). Judge Kerner wrote a dissenting opinion (R. 740-742).

The majority opinion agreed with the trial court that the defendants defrauded the plaintiff; that the plaintiff clearly was entitled to judgment on that basis alone; that the defendants had no defense for their fraud unless a release signed by plaintiff was supported by consideration (R. 735-736).

The majority held that an increase in salary which was given plaintiff by defendants about the time he signed the release constituted a valid consideration for the release. Upon that basis alone, the Court reversed the judgment for plaintiff.*

There was no evidence at all which supported this finding of the majority. The uncontradicted evidence on both sides was that there was no consideration for the release.

The defendants in their sworn answer admitted that the salary increase was given plaintiff solely because plaintiff assumed greater duties and responsibilities (R. 135). Defendants did not even infer, much less plead or testify, that the salary increase was intended as consideration for plaintiff's signing the release (R. 186, 553, 558). No party or witness on either side said so.

Yet the majority of the court below said so.

This is not merely a flagrant violation of Rule 52(a). This is a denial of plaintiff's right to due process of law.

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* The majority opinion states:
(a) "In our view, the disposition of this case turns on the effect of the release (R. 734)."
(b) "The principal question before us is the legal consequence of the release (R. 735)."
(c) "But it seems to us that however meritorious the plaintiff's claim or reprehensible the defendant's conduct may have been, the former was released and the latter forgiven by the letter which the plaintiff read, signed, and sealed (R. 736)."

The dissenting opinion states (R. 741):
"The controversial issue is the effect of the alleged release."

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

The judgment of the Court of Appeals is a mere arbitrary and capricious exercise of power and is in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. The judgment is not merely violative of Rule 52(a); it denies the plaintiff due process of law.

The judicial as well as the legislative power of the Federal Government is limited by the Fifth Amendment (*Hovey* v. *Elliott*, 167 U. S. 409, 42 L. Ed. 215, 17 S. Ct. 841).

Assume a hypothetical Federal Employer's Liability Act case; in which the railroad's defense was solely that it was not negligent, and in which the railroad conceded both in its answer and by its testimony that a release signed by the plaintiff was not supported by consideration, and that an increase in salary which was given the plaintiff was given solely because he was considered capable of taking a more difficult job, because of his background. Assume further that no witness testified that the salary increase was consideration for the release; that no witness even inferred that the salary increase was consideration for the release. Assume further that the plaintiff had a judgment; that the Court of Appeals agreed with the trial court that the railroad was negligent, yet reversed the judgment solely on the ground that the release was supported by consideration consisting of the increase in salary.

Would not this Court say that there had been a clear denial of due process of law to the injured person?

For United States Courts of Appeals are limited in the exercise of their power of review. They may not be arbitrary. They may not be capricious. Their judgment may not be in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights (Compare *Amer. Ry. Express* v. *Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 47 S. Ct. 353).

No extensive citation of authorities is required to show that historically in our system of jurisprudence, courts of review may not set aside findings of fact of the chancellor in equity cases which are based upon uncontradicted evidence (2 Street, Federal Equity Practice (1909), Secs. 1510, 1514; *Virginia R. Co.* v. *United States*, 272 U. S. 658, 675, 71 L. Ed. 463, 47 S. Ct. 222).

Just how far may a Federal Court of Appeals go in disregarding findings of fact? Does it not become a question of degree? As has been said by an esteemed Justice of this Court, do not most questions of law become questions of degree?

This case presents an identical analogous situation to the hypothetical negligence case.

The defendant, Muter, said the salary increase was not consideration (R. 186, 553, 558). The plaintiff said the salary increase was not consideration (R. 215-218). The sworn answer of defendants said the salary increase was not consideration (R. 135). No witness testified that the salary increase was consideration. No witness even inferred that the salary increase was consideration. The defendants did not plead or even infer that the salary increase was consideration (R. 135).

Yet the majority court of the court below held that they could not say that the salary raise was not consideration

(R. 738). And, therefore, they said the salary raise was consideration (R. 738).

Is this merely a procedural violation of Rule 52(a)?

The plaintiff had a judgment. A judgment is property. He has been deprived of that property. He has been deprived of that property by arbitrary and unconstitutional action—not action merely erroneous.

Has the plaintiff no remedy? Is the disinclination of this Court to review cases reversed upon the facts to prevent the plaintiff from obtaining the only redress open to him—review by this Court? If so, perhaps Rule 38 of this Court is vulnerable to constitutional attack. For Article III of the United States Constitution has vested in this Supreme Court final jurisdiction to protect persons in obtaining due process of law. If a court of review, whether state or federal, denies a person due process of law, by making a mistake so gross as to be impossible in a rational administration of justice, he should have an absolute right to review by this Court (*Chicago Lf. Ins.* v. *Cherry*, 244 U. S. 25, 30, 61 L. Ed. 966, 37 S. Ct. 492; 12 Am. Jur., Sec. 577, pg. 274).

The finding of the majority of the court below was contrary to:

(a) the finding of the trial court;

(b) the sworn answer of defendants;

(c) the testimony of defendant Muter;

(d) the testimony of plaintiff;

(e) the law governing increases in salary during the war.

(a) The Finding of the Court of Appeal Was Contrary to the Explicit Finding of the Trial Court.

The trial court's findings of fact concerning the release are much more explicit than as stated in the majority opinion.* The trial court found,

(1) "Defendants did not pay to Lawrence any money, property or stock *or any other consideration* at that time or thereafter for his interest in General Manufacturing Company" (Fdg. 29, R. 675).

(2) "All salaries that plaintiff received from General Manufacturing Company and from The Muter Company were fair compensation for his services and in no way constituted any consideration for his interest in General Manufacturing Company" (Fdg. 16, R. 674).

The language of the majority of the court below is strange and perplexing. They admit that the finding that the release was not supported by consideration *is sustained by the evidence in so far as nothing was expressly given* for the release. Either the salary increase was or was not, in fact, intended to be consideration for the release. And since defendants admitted that it was not intended to be consideration, the Court of Appeals was simply arbitrary in saying that they could not say as a matter of

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* On the vital issue of the release, the majority said (R. 738):

"Although the trial court made a finding supported by the evidence that at the time he executed the release, the plaintiff received no money or other property for his interest in General, this finding is sustained by the evidence only so far as nothing was expressly given for the interest claimed. * * * Despite the plaintiff's assertion and the finding below that this transaction amounted to nothing more than a fixing of a higher value for the plaintiff's services, we cannot say as a matter of law that this transaction must be disassociated from the subject matter of the release. A more reasonable interpretation, it seems to us, is that Muter entered into this new arrangement in order to placate the plaintiff and put an end to his recurring demands. Reference in Muter's oral remarks, testified to by the plaintiff, as well as in the release, to previous conversations, confirms our conviction that the increase in compensation ties in with and supplies valid consideration for the release."

law (without citing any law) that the increase in the plaintiff's salary must be disassociated from the subject matter of the release, and in then coming to the capricious conclusion that the salary increase was consideration for the release.

(b) The Finding of the Court of Appeals Was Contrary to the Sworn Answer of Defendants.

Paragraph 14 of the defendants' sworn answer reads (R. 135):

> "These defendants deny the allegations of the first sentence of Paragraph 14 and state the facts to be that during the year 1943, Mr. J. R. Scanlan, Sales Manager for The Muter Company, who was then receiving 1% of the net sales of the Company as his remuneration, left the employ of the Company. It was thought at this time that the plaintiff would be capable of handling the position of Assistant Sales Manager *because* of his background and, *therefore,* an application was made to and approved by the Salary Stabilization Unit authorizing the plaintiff to receive one-half of 1% of the net sales of The Muter Company as Assistant Sales Manager, said compensation to be effective as of February 1, 1943; that plaintiff's compensation for the year 1943 amount to $14,107.59. The payment of this compensation was at all times subject to satisfactory performance of his duties on the part of plaintiff, *and this arrangement for compensation was made to allow the plaintiff, along with other employees of The Muter Company to participate in a financial way in the increased activity of the Company due to the war work.* After his compensation had been increased as hereinabove set forth, the plaintiff willingly executed the Release described in this first sentence of Paragraph 14 of the Complaint. This Release under seal was entirely voluntary on the part of the plaintiff and was executed in the presence of two witnesses. No threats or intimidation whatsoever were employed at this or any other time against the plain-

tiff. Plaintiff at this time expressed himself as being completely satisfied with this situation."

Thus the sworn Answer of the defendants expressly and unequivocally negatives any implication or inference that the increase in plaintiff's salary "ties in with and supplies valid consideration for the release", as found by the majority of the court below, contrary to the finding of the trial court.

No language could be more clear than the admission in the defendants' answer that the increase in Lawrence's salary in 1943 was not impliedly, indirectly or directly or otherwise in payment for his stock interest in General, but on the contrary was solely intended to pay plaintiff for the additional duties and responsibilities of his new position:

> "It was thought at this time that the plaintiff would be capable of handling the position of Assistant Sales Manager *because* of his background and, *therefore,* an application was made to and approved by the Salary Stabilization Board * * *" (R. 135).

The majority of the court below not only disregarded this positive admission in the sworn answer of the defendants, but they *assumed* the exact opposite to be the fact. This is what they did syllogistically:

> Major Premise (Admitted Facts): The defendants admitted in their sworn answer that the reason that plaintiff received a salary increase *was* that the defendants thought plaintiff would be capable of handling the more important position of Assistant Sales Manager because of his background and, therefore, plaintiff's salary was increased; and the payment of plaintiff's compensation *was* at all times subject to satisfactory performance of his duties on the part of plaintiff, and this arrangement for compensation *was made* to allow the plaintiff along with other employees of defendant company to participate in a financial way

in the increased activity of the company due to war work (R. 135).

Minor Premise (Assumption of the Court of Appeals): Regardless of what defendants positively admitted, we *assume* that the reason that plaintiff received a salary increase *was not* that the defendants thought plaintiff would be capable of handling the more important position of Assistant Sales Manager because of his background, and we *assume* it is *not* the fact that, therefore, plaintiff's salary was increased; and we *assume* the payment of plaintiff's compensation *was not* at all times subject to satisfactory performance of his duties on the part of plaintiff, and we *assume* this arrangement for compensation *was not* made to allow the plaintiff along with other employees of defendant company to participate in a financial way in the increased activity of the company due to war work.

Conclusion of Court of Appeals Assumed Contrary to the Admitted Facts:

(1) Based upon our *assumption*, we cannot say that the salary increase was not given the plaintiff for his interest in General Manufacturing Company.

(2) Therefore, we *assume* the increase in salary was given the plaintiff for his interest in General Manufacturing Company.

(c) The Finding of the Court of Appeals Was Contrary to the Testimony of Defendant, Muter.

Muter, testified (R. 186):

"Q. *Now, you have never given Mr. Lawrence any more than 2,000 shares of The Muter Company stock for his 40 percent interest in Gen-Ral Corporation, is that correct?* A. *I believe that is correct.*

Mr. Kennelly: That is all.

The Witness: A. But we have provided Mr. Lawrence with a certain background that enabled him to make considerably more in the way of revenue by his association with us, than he would have otherwise.

By Mr. Kennelly: Q. But that was merely for services? A. That is services in our judgment that are terminable at any time."

Muter further admitted that Lawrence performed his work satisfactorily (R. 553) and also testified (R. 558):

"Q. All right. Now, in 1943—in June of 1943—the check that Mr. Lawrence got for some $5,000 was for services, is that right? A. Yes, sir.

Q. Did Mr. Lawrence get any stock from you at that time? A. No, sir.

Q. Did you give any money to Mr. Lawrence at that time, in June—May or June of 1943—other than these two checks which were for services and salary? A. No, sir.

Q. *All of the money that Mr. Lawrence received, Mr. Muter, from The Muter Company, from and after December, 1939, was for services and salary?* A. *Yes, sir.*"

The majority of the court below not only disregarded these positive admissions in the testimony of defendant, Muter, but they *assumed* the exact opposite to be the fact. This is what they did syllogistically:

Major Premise (Admitted Facts): The defendant, Muter, admitted in his testimony that defendants had never given plaintiff any more than 2000 shares of Muter Company stock for his interest in General Manufacturing Company; that all salaries that plaintiff received from the Muter Company were for services performed satisfactorily.

Minor Premise (Assumption of the Court of Appeals): Regardless of what the defendant, Muter, admitted, we *assume* the defendants have given plaintiff more than 2000 shares of Muter Company stock for his interest in General Manufacturing Company, because we *assume* that all salaries that plaintiff received from the Muter Company were not for services performed satisfactorily, but were also for his interest in General Manufacturing Company.

Conclusion of Court of Appeals Assumed Contrary to the Admitted Facts:

(1) Based upon our *assumption*, we cannot say that defendants have never given plaintiff any more than 2000 shares of Muter Company stock for his interest in General for we cannot say that all salary that plaintiff received from defendants was for services performed satisfactorily.

(2) Therefore, we *assume* that the increase in salary was given the plaintiff for his interest in General Manufacturing Company.

(d) The Finding of the Court of Appeals Was Contrary to the Testimony of Plaintiff.

The majority opinion not only misstated, but what is much worse, half-stated the testimony of plaintiff. A half-truth is more dangerous than an untruth, because it is more difficult to answer. The majority opinion omitted to state the important fact that plaintiff testified that defendant, Muter, told him about the time he signed the release that his additional stock interest would be worked out after the war, and that his increased compensation was not in lieu of his additional stock in Muter Company.

The majority opinion incorrectly paraphrased the plaintiff's testimony concerning the release as follows (R. 738):

> "The plaintiff testified that a couple of days prior to the execution of the release, he had again reminded Muter of his claim and asked him to work out 'something for my interest, percentage or something'; that Muter had promised to 'get through an arrangement with * * * War Salary Stabilization Board—for one-half of one percent of the net sales of the Muter Company'; that on June 29, 1943, Muter brought the letter into the plaintiff's office and said: 'This is relative to that temporary arrangement we talked about the other day,' adding that the new arrangement was to be made retroactive to February. It was shortly thereafter that the plaintiff went into Muter's office,

signed the release, and received two checks dated June 30, one for $5,117.75 and the other for $513.27, or a total of $5,631.02, representing his compensation for the five months ending June 30 on the new basis."

But, this is what plaintiff actually testified (R. 215-218):

"Q. Now, when next did you have a conversation, if any, with Mr. Muter, relating to your interest in Gen-Ral Manufacturing Company? A. At the—during the accounting period, at the end of 1942 and beginning of 1943. I asked—

Q. Where did that conversation take place? A. That was in the offices of The Muter Company.

Q. Who was present? A. Mr. Muter and myself.

Q. State what was said and done by you and what was said and done by Mr. Muter at that time, if anything. A. I asked Mr. Muter again about my stock interest and what arrangements he was making on my whole set-up, and he said that he was working it out. He had given me a substantial bonus of a thousand dollars, and he told me that he would raise my salary to $85 a week, and wanted to know if that didn't make me happy.

I told him I appreciated it.

I asked him if the bonus he had given me had anything to do with the rest of my stock interest in the company. He said no, it didn't have anything to do with that; he intended to work that out, but due to war regulations and salary stabilization limitations, that he hadn't been able to get to it; that if I would just let him go ahead and work it out, why, he would.

I told him I'd leave it up to him; however, I wanted to ask him if he couldn't get something through for me, because I was getting uneasy about it because the company was growing so large.

Q. Now, that was, you say, in 1943, the early part? A. The first part of 1943.

Q. What happened next? Did you receive one-half of one percent? A. About the second quarter of the year we had another conversation.

Q. Where did that conversation take place? A. That was in the office of The Muter Company.

Q. Who was present? A. Mr. Muter and myself.

Q. Anyone else? A. Mr. Dailey, I believe, was there at the time.

Q. State what was said at that conversation, if anything. A. I asked Mr. Muter to work out something for my interest, percentage or something; that I didn't feel I was even participating in the picture as much as I should at the time.

He said, well, he couldn't straighten out my stock interest or work out a percentage, that he had been talking to me on the basis he had intended.

He said he could get through an arrangement with the War Labor Regulations—or War Salary Stabilization Board—for one-half of one percent of the net sales of the entire Muter Company.

He told me if I would go along on that as a temporary basis and let him work the stock interest and the whole matter out after the war, that he would make arrangements to pay that until the end of the war and work the whole thing out afterwards.

Q. When next did you have a conversation relative to your interest with Mr. Muter, if any? A. It was a couple of days after that meeting.

Q. Will you tell the Court—who was present at that time? A. Mr. Muter and myself.

Q. State what was said. Where did it take place—in his office or where? A. In my office. He came into my office.

Q. You and Mr. Muter? A. Yes.

Q. Will you state now, go ahead and state what was done and said by you and Mr. Muter at that time? A. Mr. Muter brought a letter into my office and he said, 'This is relative to that *temporary* arrangement we talked about the other day,' and he said he was going to make my interest, or my payment on the one-half of one percent of the net sales retroactive back to February, about, of that year and bring the matter up to date, *and he said that after the war they would work it out,* and he wanted me to sign that letter.

Q. I show you a paper marked Plaintiff's Exhibit 58 for identification, and ask you to examine it and state whether or not that is the letter that he handed you that day? A. Yes, that looks like the letter.

Q. Did you get a copy of that, Mr. Lawrence? A. No, I didn't get a copy of that letter.

Q. Did you read that letter, Mr. Lawrence, at that time? A. I glanced at it while Mr. Muter waited for it and handed it back to him.

Q. You didn't get a copy, you said; is that right? A. No, I didn't get a copy.

* * *

Q. At the time you signed that letter, Mr. Lawrence, did you receive any additional stock other than the 2,000 shares in The Muter Company? A. No, I received none.

Q. Did you receive any money? A. No, I didn't receive no money.

Q. Did you receive any property of any kind? A. Nothing."

Plaintiff's testimony is clear that Muter was guilty of actual fraud in procuring his signature to the release. The trial court made a finding that "Lawrence signed the letter in reliance upon Muter to fairly account to him after the war * * * that the transaction by which Muter * * * obtained the letter from Lawrence was fraudulent in fact to Lawrence." (R. 675.)

When Lawrence signed the letter he was and had been Muter Company's employee for several years. It was a most natural thing for him to sign a letter for Muter with only a glance at it in reliance upon Muter's promise to issue, at a later date, the additional stock due plaintiff. The surrounding circumstances and the relationship of the parties, even though not a fiduciary relationship, are factors to be considered in determining whether the release may bar plaintiff from recovery. As stated in 45 Am. Jur., pg. 686: "The General principle that fraud vitiates every act applies to releases. A nominal or grossly inadequate consideration for a release will, in connection with other circumstances, such as the releasor's situation, conduct and surroundings at the time of the release * * * be given

serious consideration as affecting the question of fraud in its procurement. * * *"

It is obvious that a mere increase in salary for a new and more important position from which plaintiff could be discharged immediately at will was never intended to constitute consideration for the release of a claim for over $100,000. Even defendants did not have the temerity to so contend.

But even assuming that the Court of Appeals was correct in setting aside the finding that the release was procured from Lawrence by actual fraud, there is absolutely no testimony or evidence in this record on the part of either side which warranted that court in setting aside the finding of Judge Igoe to the effect that there was no consideration whatever for the release. Under such circumstances the release in this action in equity was void for want of consideration under the cases cited by the majority of the Court of Appeals (*Toffenetti* v. *Mellor*, 323 Ill. 143; 153 N. E. 825; Williston, Treatise on Law of Contracts, Sec. 1820; *Mosby* v. *Chapin*, 217 Ill. App. 442).

The majority of the court below not only disregarded the testimony of the plaintiff but misrepresented his testimony.

> Major Premise (Undisputed Testimony of Plaintiff): Plaintiff testified that defendant, Muter, told him when he was given his salary increase that the salary increase had nothing to do with his additional stock interest in Muter Company.
>
> Minor Premise (Assumption of Court of Appeals): Regardless of what the plaintiff testified and regardless of the fact that his testimony is not only undisputed, but corroborated by the testimony and the sworn answer of the defendants, we cannot say that Muter did not tell plaintiff that the salary increase was in lieu of his additional stock interest in Muter Company.

Conclusion of Court of Appeals, Assumed Contrary to the Undisputed Testimony of Plaintiff:

Therefore, we assume that Muter did tell plaintiff that his salary increase was for his interest in General, and therefore, we further *assume* that the salary increase was consideration for his interest in General.

(e) The Finding of the Court of Appeals was Contrary to the Law Governing Increases in Salary During the War.

In order for the Court of Appeals to find that the increase in the plaintiff's salary was consideration for his release of his claim to additional stock in his employer Muter Company, the majority of the Court of Appeals *assumed* that the defendant Muter Company was guilty of a positive violation of the Emergency Price Control Act concerning salary stabilization during the war. An increase in salary during the war could not constitute lawful consideration for the release of an employee's claim against his employer.

The law which governed increases in salary during the war is clear that increases in salary could not be granted for any such reason as to constitute consideration for the purchase of stock from an employee. (U. S. C. A. Tit. 50 App. 901, Executive Order 9250, Tit. II.) During the war, an increase in salary, in order to be approved by the Salary Stabilization Board, had to be warranted by the increased responsibility of the employee. The salary increase had to be for work done and for no other reason. The defendants have admitted unequivocally that Lawrence's increase in salary was given to him solely because the defendants considered him capable "of handling the position of Assistant Sales Manager because of his background".

The Salary Stabilization Unit of the Treasury Department approved the salary increase for Lawrence pursuant

to the Emergency Price Control Act and the President's Executive Orders pursuant thereto (U. S. C. A. Tit. 50 App. 901, Executive Order 9250). (Defendants' Exhibit 11.)

The effect of the majority opinion below is that they *assume*, without any supporting evidence or pleadings, that defendants were guilty of a direct and positive fraud upon the United States Government in obtaining a salary increase from the Salary Stabilization Board of the Commissioner of Internal Revenue for Lawrence by subterfuge in order to pay him for stock purchased from him in 1939.

Is it not strange that a federal court of appeals not only improvised but sanctioned as a defense in a fraud case, a clear-cut violation of federal law?

Therefore, the majority of the court below not only disregarded positive admissions in the testimony and answer of the defendants as well as the testimony of plaintiff, but in order to find that the salary increase was consideration for a release by plaintiff of his claim to more stock in Muter Company, they had to *assume* that defendants were guilty of a violation of United States law governing salary increases during the war.

CONCLUSION.

We are aware of the disinclination of this Court to review cases which turn upon the facts. But this case is a classic example of an utter and arbitrary disdain for Rule 52(a).

If Rule 52(a) can be ignored to the extent that it was ignored in this case, then the rule may as well be abrogated. For the rule has no meaning in reality. And litigants have no redress in reality when their judgments are arbitrarily reversed on the facts by a court of appeals,—without refer-

ence to the pleadings or the evidence which support the fact findings—without reference to Rule 52(a)—without even saying that the findings are erroneous much less clearly erroneous. Judge Kerner in his dissenting opinion pointed out that the findings were supported by the evidence when he said (R. 742):

> "I doubt that it would serve any useful purpose to detail the evidence relating to this issue. I believe it will be enough to say that I have examined the evidence and the testimony of all the witnesses heard, considered the inferences fairly to be drawn from all the evidence, and have reached the conclusion that Judge Igoe's findings are supported by the evidence. That was enough. Hence the findings are not clearly erroneous. In this situation, they are inescapably binding on this court. They must stand undisturbed on appeal. Rule 52(a) Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723c."

In each circuit the Court of Appeals has recognized (1) They may not inquire to ascertain other than whether a finding is clearly erroneous; (2) They may not set aside a finding of fact merely because the reviewing court would have found differently in the record; (3) They may not try the case *de novo: Manning* v. *Gagne*, 108 Fed. (2d) 718, (1st Circuit); *Corbett* v. *Halliwell*, 123 Fed. (2d) 331, (2nd Circuit); *Katz Underwear Co.* v. *U. S.*, 127 Fed. (2d) 965, (3rd Circuit); *Guilford Construction Co.* v. *Biggs*, 102 Fed. (2d) 46, (4th Circuit); *Sundt* v. *Turman Oil Co.*, 107 Fed. (2d) 762 (5th Circuit); *Andrew Jergens Co.* v. *Conner*, 125 Fed. (2d) 686, (6th Circuit); *Campana Corporation* v. *Harrison*, 114 Fed. (2d) 400, (7th Circuit); *Storby* v. *Armour & Co.*, 107 Fed. (2d) 499, (8th Circuit); *Occidental Life Insurance Co.* v. *Thomas*, 107 Fed. (2d) 876, (9th Circuit).

This Court has said (*United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 552) "that a

finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Here, there was no evidence at all which could justify the majority of the Court of Appeals in reaching the "firm conviction" that a mistake was committed by the trial court in finding that the salary increase was not consideration for the release.

We respectfully submit that this case points up a remarkably flagrant disregard not merely of Rule 52(a), but of those fundamental principles which have been established in our system of jurisprudence for courts of review generally.

We respectfully ask this court to grant the writ of certiorari requested herein.

THOMAS D. NASH,
DANIEL J. LAMONT,
JOHN J. KENNELLY,
Suite 1449
111 W. Washington Street
Chicago 2, Illinois
Counsel for Petitioner, Metropolitan Trust Company, as Conservator for Stanley O. Lawrence, an incompetent person.

DANIEL J. LAMONT,
JOHN J. KENNELLY,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

Nos. 687 and 688

METROPOLITAN TRUST CO., AS CONSERVATOR FOR STANLEY O. LAWRENCE, AN INCOMPETENT PERSON,
Plaintiff-Petitioner,

vs.

THE MUTER COMPANY AND LESLIE F. MUTER,
Defendants-Respondents.

RESPONDENTS' ANSWER AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

THOMAS DODD HEALY,
HAROLD STICKLER,
A. BRADLEY EBEN,
208 S. LaSalle Street,
Chicago 4, Illinois,
Attorneys for Respondents, The Muter Company and Leslie F. Muter.

THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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ANSWER TO PETITION FOR WRIT OF CERTIORARI.

Petitioner invokes Rule 38, Sub-section 1(b) of this Court in order to invoke its aid in the exercise of its supervisory powers to allegedly "correct" the judgment of the Court of Appeals for the Seventh Circuit reversing Petitioner's judgment theretofore recovered in the District Court.

Petitioner gives as the only reason for invoking this Court's supervisory power, his contention that the Court of Appeals "arbitrarily and capriciously refused to follow the fact findings of the District Court", which he contends was the only finding supportable by the evidence. It is clear that to come within Rule 38-1(b), there must be a showing that the Court of Appeals "has so far departed from the accepted and usual cause of judicial proceedings, * * * as to call for an exercise of this Court's power

of supervision." In a desperate attempt to come within the scope of this Rule, Petitioner, by misstatements, omissions and spurious syllogisms, grossly and ridiculously distorts the "questions presented", the evidence, the theory upon which he tried his case below, the principles of law applicable, and the basis upon which the Court of Appeals reversed the District Court, thereby attempting to make it appear that certain facts were controlling and not in dispute, and that the Court of Apeals acted in a shocking ignorance or wilful disregard of the facts and the law, Rule 52(a) of the Federal Rules of Civil Procedure, and the due process clause of the Fifth Amendment.

If this Court adheres to its Rule 38 with the result that the writ is refused (as it obviously should be) then Petitioner has the temerity to suggest that Rule 38 itself is unconstitutional (Pet. p. 7).

Since "only the questions specifically brought forward by the Petition for Writ of Certiorari will be considered" (Rule 38-(2)), Respondents will address themselves, at this stage of the proceedings, in answering the unwarranted construction of the Court of Appeals decision.

QUESTIONS PRESENTED.

Was the Court of Appeals in error in determining as a matter of law, under the controlling Illinois Rules of Decision, that plaintiff *had wholly failed to sustain his burden of establishing* (a) that a fiduciary relationship ever existed between the parties; (b) that plaintiff was overreached and injured through the execution and carrying out of said contract; and (c) that the release executed by plaintiff to defendant was procured by fraud or was made without consideration?

STATEMENT OF THE CASE.

The cause of action at the trial in the District Court was based upon an alleged existence of a fiduciary relationship between the parties, which it was contended was breached by the defendant, Leslie Muter, who over-reached his *cestui,* the Petitioner (hereinafter sometimes called plaintiff or Lawrence) in purchasing the latter's property under a contract which was the outgrowth of his creditor's liquidation plan. The complaint as filed in the District Court was based upon an alleged "breach of trust" of acquiring "trust property" without accounting or paying therefor (Par. 2 of Compl., Rec. 2, 3, District Court's Conclusions, Rec. 676-679).

Since the complaint also alleged facts which were inconsistent with, and therefore repugnant to such a relationship, and which showed the impropriety of the legal conclusion as to the existence of the fiduciary relationship and any fraudulent scheme, defendants challenged the sufficiency of the complaint (Rec. 41-52). The Court of Appeals expressly held that such allegations of plaintiff to be "without merit", thus expressly outlawing the basic premise of the complaint (Rec. 734).

At the trial in the District Court no evidence as to the existence of any fiduciary relation or a breach thereof was ever adduced which could support the District Court's findings that such relationship existed between the parties. It was natural, therefore, that the defendants appealed to the Court of Appeals, challenging the sufficiency of the evidence to support the judgment entered by the District Court in plaintiff's favor for $128,438.33 (Rec. 681-4).

The Court of Appeals reversed the judgment for plaintiff and directed judgment for the defendants (Rec. 743), basing its opinion, among other things, on the failure of proof to establish the existence of any fiduciary relationship by the plaintiff to the defendants, and the execution of the release covering any claim which plaintiff might have had.

Petitioner grossly misstates the basis of the Court of Appeals reversal when he says as to the release: "Upon that basis alone the Court reversed the judgment for plaintiff"; and in asserting that the majority opinion of the Court of Appeals agreed that the defendant "defrauded the plaintiff; that the plaintiff clearly was entitled to judgment on that basis alone; that the defendants had no defense for their fraud unless a release signed by plaintiff was supported by consideration" (Pet. p. 4).

We do not think that the Court of Appeals opinion or the evidence in the trial record below can be tortured to support such a statement.

THE EVIDENCE.

The undisputed evidence was that the plaintiff, Lawrence was an insolvent manufacturer of radio products who was completely in the hands of his creditors in 1938 (Rec. 5, 265, 417, 433, 420, 434). The Court of Appeals opinion stated that at such time, the plaintiff was "admittedly insolvent" (Rec. 732). The defendant Muter, *not* one of those creditors, was a successful manufacturer of radio products. Muter first met plaintiff when the creditors and plaintiff asked him to acquire the latter's business by purchase in order to pay off the creditors at 40 cents on the dollar (Rec. 263, 286, 732).

Prior to that time, both plaintiff and defendants were complete strangers, and no fiduciary relationship existed. It was admited that prior to the execution of the contract in May, 1938, there had never been any business dealings between them (Rec. 199, 200). The preliminary negotiations leading up to the contract were between Muter and the creditors' committee for plaintiff (Rec. 424-425) who sponsored the plan in asking all the creditors to accept it. Plaintiff was then doing business under the name of General Manufacturing Co.

This contract (Rec. 5-12) was executed by both parties, including initialing of each page. Succinctly, the contract, after reciting that plaintiff was insolvent, provided for Muter to loan $25,000 to a new General Manufacturing Corporation, by which the creditors were to receive 40 cents on the dollar for their claims, all taxes would be paid, the new corporation furnished with working capital, Muter to own 60% of the stock, Lawrence 40%, and Muter to have Lawrence's stock as security for his loan with specified

rights to acquire it *either by payment of cash at book value, or by exchange of stock of any new or merged corporation, whichever Lawrence should elect* (Rec. 10).

Thus for his "equity" in an insolvent business, the plaintiff was provided with an opportunity for employment (Rec. 11), plus a share in a new going business.

However, in 1939, prior to the war boom, the new General Manufacturing Co.'s business was still not profitable, and Muter decided that unless operating economies could be instituted to place the business on a profitable basis, General should be liquidated (Rec. 511).

This election of Muter's to "bail" out was strictly in accord with the terms of the contract between the parties (Par. 9 of Defendants' Ex. 10, Rec. 10-11). Muter, after discussion with Lawrence, proposed that General consolidate its activities with The Muter Company and move into the latter's building. This was later accomplished.

Thereafter in pursuance of par. 8 of the contract (Rec. 10), on April 21, 1939, Lawrence received 2,000 shares in The Muter Company in exchange for his stock interest in General (Rec. 514-5). It should be noted that he did not ask for cash equivalent to the book value of his stock in General, in lieu of the 2,000 shares of The Muter Company, as he might have elected to do under Par. 8 of the contract (Rec. 10). The record is undisputed that plaintiff Lawrence received substantial value for his "sale" of his interest in an insolvent business. In addition to a job in a new going concern, for which he received $44,713 from 1938 to 1945, he also owned 2,000 shares of Muter stock, which at the time of the trial was valued at $8.25 per share (Rec. 649), and therefore had a market value of $16,500.

From January 1, 1941 to March 1942, Lawrence had a

drawing account and was paid 10% of the profits of the "Gen-Ral" Division of The Muter Company. Later in 1942 this was changed to 5% of the profits of The Muter Company, all of which was paid for his services (Rec. 529-32).

In June 1943, apparently with hindsight envy, (Rec. 740) Lawrence asserted to Muter that he had or should have a further undefined "interest" in the business apart from his commission and stock ownership of 2,000 shares. Muter told him he had no "interest", and in view of Lawrence's claims he wanted that settled once and for all (Rec. 534-5).

After discussion between the parties, which terminated in plaintiff's securing an increase in salary and continued tenure with the company, he executed a release to Muter, his employer, abandoning his "alleged claim" (Rec. 36). After almost a year had passed, Muter made some changes in the sales organization of the company by bringing in new personnel (Rec. 542). This produced dissatisfaction in Lawrence, and he consulted an attorney under whose direction he began a series of letters to The Muter Company demanding money for his "interest" (Rec. 220-5). These letters were sent in the summer of 1944 and the spring of 1945. A climax was reached when Lawrence attempted to interfere with a registration statement of The Muter Company before the Securities and Exchange Commission (Rec. 142-7). Then followed his letter on May 14, 1945 to the defendants demandng $50,000 and "income taxes" for his alleged "interest" (Pltff's Ex. 65, not printed, Rec. 224). The next day he was discharged (Rec. 547) and fourteen months later filed his complaint in the District Court. Thus, it was over seven years from April 1939, when he accepted the 2,000 shares of The Muter Company stock for his "interest" in his own company, in accordance with the terms of his contract with defendants,

until the instant suit was filed, a suit clearly barred by the pleaded laches or limitation (Rec. 41).*

Plaintiff's complaint in the instant case was based entirely on an alleged breach of trust. The District Court, adopting this erroneous premise and basing its entire decree on findings of the existence of a fiduciary relationship, when the evidence wholly failed to support such a position, entered a judgment for plaintiff for $126,000.00 (Rec. 676-79).

Since it is here clear that Petitioner understates many of the essential points in the majority opinion of the Court of Appeals, and unduly emphasizes the point thereof dealing with the release in disregard of all other points of such opinion, any one of which was decisive of the case, we feel it necessary to discuss the Court of Appeals' decision at some length, as a basis for Respondents' contention that this petition should be denied.

* The applicable Illinois limitation period is five years. Ill. Revised Stat. Chap. 83, Par. 16; *Bunker Hill C. C.* v. *McElhatton* 282 Ill. App. 221, 237; *Herr* v. *Payson*, 157 Ill. 244.

THE ARGUMENT.

I.

The Unanimous Rejection by the Court of Appeals of the Basic Promise of the Trial Court That a Fiduciary Relationship Existed Destroys the Validity of the Findings and the Decree Based Thereon.

Both the majority and the dissenting opinions of the Court of Appeals agreed that as a matter of law, a fiduciary relationship was not shown to have existed between the parties (Rec. 729-740).

This represented a rejection of the basic premise upon which the entire fabric of the plaintiff's case rested, and upon which the trial court's findings and judgment were constructed. (Dist. Ct.'s Findings 5, Rec. 671 and Conclusion 4, Rec. 676.)

Based entirely upon the erroneous basic premise that a fiduciary relationship existed, the trial court improperly threw the burden of the proof upon the defendants; admitted the otherwise inadmissible oral testimony of the plaintiff to vary the clear terms of the contract and the release (which evidence was the only evidence that plaintiff relied on to establish the fact that he was to get "more" than that for which the contract provided); improperly construed the contract between the parties on the theory that it should be construed strictly against the defendant since he was a Trustee; and held the defendant accountable on the erroneous theory that he was a Trustee who should not make a profit in dealing with a beneficiary (Rec. 676-8). The profits, of course, came from the "war" business not forseeable at the time of the contract in 1938.

Obviously, then, upon a review of these erroneous basic premises, when the Court of Appeals unanimously determined that there was no evidence at all to support the finding and conclusion that a fiduciary relationship existed between the parties, the trial court's findings based thereon had no validity.

Since both the majority and the dissenting opinions of the Court of Appeals found that no fiduciary relationship existed, it is readily seen that the Petitioner herein has *grossly over simplified* the basis of the reversal when he states that the majority opinion agreed that the defendants defrauded the plaintiff; and that Plaintiff was entitled to judgment on that basis alone unless the release signed by plaintiff was supported by consideration (Pet. p. 4).

A fair construction of the majority opinion indicates that it has demolished the structure of plaintiff's case and the findings and judgment of the trial court on a point by point basis.

II.

There Was a Total Failure in Plaintiff's Evidence to Establish a Cause of Action.

Petitioner is in error in contending that he could and would have recovered had it not been for the release. Petitioner tortures this premise from the language of the majority opinion preceding its reference to the case of *Howard* v. *Howe*, 61 F. (2) 577, (Rec. 736).

It is true that in considering whether the doctrine of *Howard* v. *Howe, might,* but for the release, be properly applied under the facts and circumstances of this case, the majority opinion made certain assumptions of fact and expressly said that they would not analyze the record (Rec. 735). Thus the majority *assumed* that the evidence showed that the defendant Muter had a fraudulent intent in April

1939; *assumed* that at the time of the exchange, the defendant promised plaintiff to give some *unspecified* additional consideration to him over and above the 2,000 shares of Muter Co. stock, and reiterated such promise on numerous subsequent occasions; *assumed* that such promises were made solely to lull and delude plaintiff; and *assumed* (despite serious reservations as to the relative values of the two blocks of stock) that the 2,000 shares of Muter Co. stock were an inadequate consideration (Rec. 736). If the facts actually corresponded with all of these assumptions, then, in the view of the majority opinion, the doctrine of *Howard* v. *Howe* would be applicable, but for the release.

Actually, if the facts and evidence did truly correspond with all these assumptions, then the Court of Appeals would no doubt have held that a fiduciary relationship had been established, with the result that all the legal consequences of such fiduciary relationship would necessarily follow, and with the result that the defendant Muter could have then been under equitable strictures to assume the burden of proof in establishing the fairness of his bargain, and to account for any profits made by him in his venture with his *cestui*.

Obviously these assumptions of the majority opinion were made only for the purpose of argument so that a theoretical premise could be laid for the consideration of the effect of the release. In effect the majority held that, *assuming solely for the purpose of argument the worst facts possible from defendants' standpoint,* nevertheless the liability which might arise under the doctrine of *Howard* v. *Howe* was effectively released.

While the majority chose to make these assumptions in order to lay a theoretical premise for the consideration of the effect of the release, *it found the true facts to be directly opposite, in substance, as appears from the opinion and the necessary inferences to be taken therefrom. The*

Court of Appeals opinion was based upon the following fundamental premises:

1. That there was no fiduciary relationship;
2. That Defendant Muter never over-reached plaintiff, and thus by necessary implication, that plaintiff sustained no injury and suffered no damages;
3. That defendant Muter had no fraudulent intent when the parties started their dealings, which resulted in benefits, not losses, to plaintiff;
4. That the contract between the parties was valid and voluntarily entered into by both parties and that plaintiff received *all* of the stock in The Muter Company to which he was *entitled* under the terms thereof;
5. That even if it be assumed that defendant Muter's intent at the time of the exchange was fraudulent, nevertheless, the release was effective and controlling.

The essence of the doctrine of *Howard* v. *Howe* is that a fiduciary relationship existed and that the fiduciary fraudulently obtained the property, *i. e.* the *res* from the beneficiary for which he should account. In the language of the Court in

Howard v. *Howe,* (C. C. A. 7) 61 F. (2d) 577, at p. 579:

> "The oral testimony and the documentary evidence are such as to convince us that the District Court was amply justified in finding that there came into existence *a confidential and fiduciary relationship* upon the part of the officials of the company toward the appellee, *which led him to rely implicitly upon the misrepresentations and false promises of such fiduciaries.* * * * *As a result the employer and its participating officials became constructive trustees for appellee.*" (Emphasis supplied.)

Where, as here, the Court of Appeals unanimously determined that no fiduciary relationship existed, obviously, the doctrine of *Howard* v. *Howe* had no application. And

going further, where, as here, the Court determined that the plaintiff was not over-reached—in effect not injured—not damaged—*even if a fiduciary relationship existed, there would be nothing to recover.*

Thus, it may be seen that Petitioner is grossly misstating and distorting the majority opinion in asserting that the Court of Appeals held that plaintiff would have had a clear right to recover as in a case of common law fraud and deceit but for the release. Actually, both the rule of this case and the well established law is that only where a fiduciary relationship existed as a matter of law would the plaintiff ever have had a right to recover, and then only if he was over-reached and deprived of his trust *res.* Having determined that no fiduciary relationship existed, there remained no basis in law to support plaintiff's judgment. While it is true that the majority opinion did state that:

> *"In our view, the disposition of this case turns on the effect of the release,"*

nevertheless, we believe the fair and reasonable interpretation of the majority opinion is that the case was being decided on the basis of all the points made by the Court, as above listed, including the point that the release was valid and effective; *and that even if the other points were disregarded, the additional fact that a valid and effective release was given was, as a matter of law, sufficient, in and of itself, to justify reversing the judgment.*

The Court of Appeals expressly stated that:

> "The plaintiff's testimony that he released the defendants from all claims on Muter's promise to give him an additional interest, thereby retaining the very claim purported to be liquidated by the release, is a patent contradiction that we find impossible to reconcile. The written terms of the release must govern." (Rec. 737.)

Yet petitioner blandly states that "Muter was guilty of actual fraud in procuring his signature to the release" (Pet. p. 16). What *actual* fraud petitioner is speaking of, he does not define—certainly none of the recognized elements of fraud were present. Even if it be assumed that Muter was guilty of fraud (which he most certainly was not) yet plaintiff could not recover for he was not injured, to the contrary he was benefited, under the express finding of the Court of Appeals (Rec. 740).

See:

Boatmen's Nat. Co. v. *Elkins Co.* (C. C. A. 8), 63 F. (2d) 214, 216.

Nor did the defendants ever contend that the "salary increase" of June 29, 1943, was not paid for plaintiff's services. Yet, it nevertheless had a definite bearing on the release which was simultaneously executed under seal by the plaintiff. In executing said release, the plaintiff gave up nothing of any actual value, but only a *claim* that was wholly without foundation. This alleged *"claim"* was that as Muter was his trustee, plaintiff was entitled to an accounting of his alleged "interest" as a beneficiary of a trust.

The evidence was clear that Muter told plaintiff that if this salary increase was put into effect and made retroactive to February 1, 1943, he wanted it understood that there would be an end of plaintiff's alleged claim of an additional "interest" in The Muter Company, other than as a stockholder owning the 2,000 shares received by him in the exchange on April 21, 1939 (Rec. 535). This was done by the agreement of the parties.

Petitioner's specious argument that on June 29, 1943, he was being asked to release and relinquish anything of value is wholly without merit, and is based upon his continued adherence to his theory of a fiduciary relationship,

for without that premise, he has nothing upon which to base his claim.

Petitioner attempts to distort Muter's testimony and the pleadings so as to make it appear that Muter said that the salary increase was not intended as consideration for the release (Pet. p. 6). Upon analysis of the testimony of Muter relied on by petitioner in this regard, the substance of Muter's testimony is as follows:

(a) The only stock given to Lawrence for his stock in general was the 2000 shares of Muter Co. stock.

(b) The only cash paid to Lawrence after December, 1939, was for services, as salary.

(c) But in addition to the above, The Muter Co. gave Lawrence an opportunity to continue working for the company, although it could have dismissed him, and to make and enjoy considerably higher wages than he would have otherwise (Rec. 186).

It is clear that Muter had in mind the important larger question of whether he should continue to employ this disgruntled and irrational employee at all, at any wage; and that such a question was resolved in Lawrence's favor upon execution of the release. It was precisely the recognition of this situation which captured the attention of the Court of Appeals and led it to hold that the "increase in compensation ties in with and supplies valid consideration for the release" (Rec. 738). Obviously, by foregoing the right to discharge plaintiff who had given sufficient provocation for so doing by his recurring demands, and instead, by retroactively increasing his salary for his services which the company had no obligation to grant, even if we assume he may have merited such increase, the company gave ample consideration in law for the release.

III.

The Review by the Court of Appeals of this Case Was in Accord With Rule 52(a) of the Federal Rules of Civil Procedure, and in Accord With the Applicable Rule of Decision in Illinois, and in the Court of Appeals for the Seventh Circuit.

Although the trial court concluded as a matter of law that defendant Muter stood in a fiduciary relation to plaintiff Lawrence (Concl. 4, Rec. 676) it was defendants' position in the Court of Appeals that the testimony presented wholly failed to support the District Court's findings and conclusions.

The Court of Appeals rejected as "clearly erroneous" the District Court's conclusions and findings that a fiduciary relationship existed between the parties. *Lawrence* v. *Muter,* 171 F. (2d) 380 (Rec. 731-742).

The existence or nonexistence of a fiduciary relationship, and the existence or nonexistence of fraud is always a mixed question of law and fact. *Ogilvie* v. *Knox Mach. Co.,* 59 U. S. 490, 18 How. 577.

It is well established that in an equity action such as this, where the facts are found by a District Court without a jury, a reviewing Court is not bound by the determinations of the trial judge *on a mixed question of law and fact.*

> *U. S.* v. *U. S. Gypsum Co.,* 333 U. S. 364, 92 L. Ed. 746.

See also:

> *Bogardus* v. *Comm.* (1937), 302 U. S. 34, 39.
> *Bell* v. *Porter* (C. C. A. 7), 159 F. (2d) 117, 120.
> *Exmoor Country Club* v. *U. S.* (C. C. A. 7), 119 F. (2d) 961.

Becker v. *Loew's, Inc.* (C. C. A. 7), 133 F. (2d) 889, 894.

U. S. v. *Anderson* (C. C. A. 7), 108 F. (2d) 475, 479.

Furthermore, the finding of the existence of a fiduciary relationship is clearly one of law, or at most, a mixed question of law and fact under the Illinois rule of decision, which holds that such relationship may never be established, except by "proof clear, convincing and so strong as to lead but to one possible conclusion."

Stewart v. *Sunagel*, 394 Ill. 209.

Finney v. *White*, 389 Ill. 374.

Johnson v. *Lane*, 369 Ill. 135.

Whether the proof of a fiduciary relationship was indeed so clear, so convincing, and so strong in the case at bar "as to lead to but one possible conclusion" was properly a question of law for the Court of Appeals to decide.

Vargas v. *Esquire* (C. C. A. 7), 166 F. (2d) 651 (Cert. denied 335 U. S. 813).

Although the Illinois rule of decision as to the high and strict degree of proof in a case of this type is undisputed, the trial court wholly disregarded it, and applied an erroneous and improper burden of proof on the defendants (Concl. 7, 9, Rec. 676-7).

It is, therefore, clear that the District Court's conclusions of law or of mixed law and fact as to the existence of a fiduciary relationship and that there was fraud practiced on the plaintiff were not binding upon the Court of Appeals, and in reaching contrary conclusions, the reviewing court was acting well within its proper powers of review as prescribed by Rule 52(a) of the Rules of Civil

Procedure. It therefore did not abuse its appellate powers as petitioner contends.

Actually, apart from plaintiff's own oral, unsupported, and improbable testimony, denied by defendant, that defendant Muter promised him *more* than the written terms of the contract specified, there was no serious dispute in the evidence bearing on the question of the existence of the fiduciary relationship between the parties, or even the existence of any trust *res*. Collectively, it presented a simple question of law for determination by the Court of Appeals.

The Court of Appeals having correctly discharged its function in determining as a matter of law that no sufficient evidence, in fact no evidence at all, existed upon which to base such a fiduciary relationship, properly determined that the District Court's findings and conclusions were without validity.

Vargas v. *Esquire*, 166 F. (2d) 651, 654 (C. C. A. 7).

It is interesting to observe that Judge Kerner, who wrote the opinion for the Court of Appeals reversing District Judge Igoe on the same basic grounds in the *Vargas* case, was the dissent in the case at bar, where the plaintiff's case was far weaker than *Vargas'* case, as pointed out by Judge Minton (Rec. 740). District Judge Igoe was the trial judge in both cases and obviously had a fundamentally erroneous perception of what constituted a fiduciary relationship as a matter of law.

Conclusion.

Contra to petitioner's contentions, the Court of Appeals decision was not based upon a finding of fact that the release alone wiped out and destroyed an existent cause of action, but rather upon several grounds including the basic holding that no fiduciary relationship ever existed between the parties, *as a matter of law*.

It is respectfully submitted that the petitioner has shown no reason for granting of a writ of certiorari to the Court of Appeals to review this case, and the issuance of the writ should be denied.

Respectfully submitted,

THOMAS DODD HEALY,
HAROLD STICKLER,
A. BRADLEY EBEN,
Counsel for Defendants-Respondents.